

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS

Anderson County,

Plaintiff,

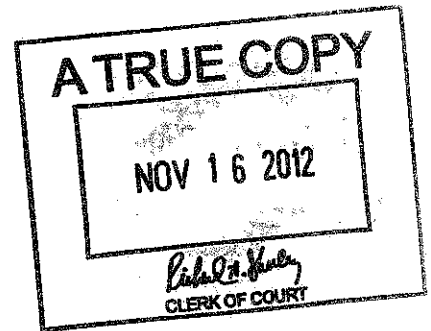
vs.

Joey Preston and the South Carolina
Retirement System,

Defendants.

C.A. No. 09-CP-04-4482

**PLAINTIFF'S POST-TRIAL
MEMORANDUM**



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I. Introduction.

On November 18, 2008, Joey Preston and the majority supporting him forgot they were public servants with fiduciary obligations to the citizens of Anderson County. At that moment, they were so intent on thwarting what – they were sure – the incoming majority had planned that they ignored fundamental rules of conflict of interest, and their obligation to deal prudently with public money.

The result was an unjustifiable \$1.1 million settlement – worth considerably more than that to Preston in present value terms – conferred on a public servant (the “Severance Package” or “Severance Agreement”). Michael Thompson, who chaired the meeting, was actively courting Preston for a job at the time of the vote. The daughter of the chair of the Personnel Committee – who negotiated the Severance Package and introduced it onto the agenda with the statement that he was the only Council member who had read it – had only two weeks before received a ridiculously beneficial contract obviously designed to tie the hands of any future Council that might want to terminate her contract.

The purported basis for the payment, at the time, was a logically impossible claim that Preston’s existing employment contract (the “Employment Agreement”) had been “anticipatorily breached.” This claim was plainly without merit, since the Employment Agreement provided that Preston could be terminated at any time, and because the purported “breach” was attributed to people who were not in office and so could not act for the County. The Severance Package further offended rationality by giving a public official far more than he would have been entitled to under the Employment Agreement even if that contract had been anticipatorily breached – in the form of a full retirement at age 45, courtesy of the taxpayers. Despite the clear absence of any valid claim – and despite the advice of Tom Bright, a lawyer retained by the County to

advise it on the severance, that the sitting Council's best option was to "do nothing" – Preston's allies rushed to present and vote on the Severance Agreement with no advance public notice.

The primary justification for the Severance Agreement offered by Preston at trial was that Anderson County could legitimately pay Preston a full severance, and then some – even in the absence of a breach – because the political atmosphere in Anderson County was "toxic." To prove this "toxicity," Preston and the 2008 County Council members who voted in favor of his golden parachute point to an amalgam of events that occurred years before, anonymous acts not attributable to the County, and ideas for future legislative action that had not been voted on. None of these things, in any combination, could justify the conclusion that the Employment Agreement had been breached (anticipatorily or otherwise) or that it was a justifiable use of public money to pay him over a million dollars because he might face a difficult political landscape, in what is plainly a political job.

Councilwoman Gracie Floyd was forthright in testifying that she did not "recall much about the claim of Joey Preston," but thought the Severance Package was justified because she "believed the speculation" that Mr. Preston would be "fired without compensation," and she wanted to be "fair" to Mr. Preston because "it was all over town that they were going to get Joey Preston," and she was "sick and tired of it." Simply put, that is not a valid justification for the exorbitant Severance Package paid to Preston in this case.

The spark that led to this unjustifiable deal was that, in the 2008 primaries, the voting public of Anderson County sided with candidates who ran in part on a platform that included more careful scrutiny of the Preston administration. Might that be a future nuisance for Preston? Yes, it could be. But it was not a breach of contract, nor was it a tort, and it certainly did not justify paying him more than he could possibly collect under the Employment Agreement.

The Severance Package should be rescinded. In that regard, it is important to emphasize that this is not a private contract case. It turns principally on the Court's authority to undo an improper public action – here, one that was carried out by County Council members who never should have participated in the deliberation and vote, and that was unreasonable on its face because of its size and lack of justification. Anderson County submits that in fashioning a remedy, the Court must take that public interest into account, along with other courts that have recognized that a void public act like this one cannot be allowed to stand.

II. Tainted Votes and Improper Participation Require That the Severance Package Be Voided.

Anderson County's first cause of action seeks rescission on the basis of improper votes cast in favor of the Severance Package. The Anderson County Code is clear that an appearance of impropriety is sufficient to render a vote improper.

*No member [of county council] shall vote on any matter in which he/she has a personal or financial interest Any member shall be **deemed to have a personal or financial interest if:** He/she has such an interest individually or if any member of his/her immediate family (i.e. brother, sister, direct ancestor or **direct descendent**) has such an interest. . . . He/she has a substantial financial interest in any business which contracts with the county for sale or lease of land, materials, supplies, equipment or services or personally engages in such matter **He/she cannot, for any other reason, render a fair, unbiased and impartial judgment in the matter, or his/her participation in the matter at hand would create a substantial appearance of impropriety.***

ANDERSON COUNTY CODE OF ORDINANCES § 2-37(g) (emphases added).

A. One Tainted Vote Is Enough to Require Rescission.

Anderson County has cited to the Court a line of cases holding that under certain particular circumstances, a local governmental act may be voided by the involvement of just one improper participant, even if the margin of passage of the act is larger than the number of bad votes. We will not reiterate all of those citations here, but note that trial established that

numerous factors that have led courts to apply this one-tainted-vote rule are present in this extraordinary case.

First, the vote to pay Preston \$1.1 million was a *special benefit to one individual*, rather than a law of general application. It thus did not have the dignity of generally applicable legislation that affects all citizens, and that can be addressed in subsequent political cycles. Approval of a contract with an individual falls outside the category of laws of general application.

This factor is reinforced by the fact that the Package was passed by a *simple motion – not in the form of an ordinance* that would require public notice and three readings. *See Thompson v. Atlantic City*, 921 A.2d 427, 438 (Supreme Court of New Jersey invalidated settlement with mayor approved by 5-1-1 vote of city council, given conflict of single councilman who had been offered job by mayor, *even though that councilman did not vote on reconsideration*); *Appeal of City of Keene*, 693 A.2d 412, 415 (N.H. 1997).

Next, the presence of a single tainted vote is particularly serious where that *one bad vote was cast by a leader of the body*. This factor is doubly strong here, as both the Chair of County Council and the Chair of the Personnel Committee never should have been involved. The videotape of the November 18 meeting reveals that Chairman Thompson played a key role in shepherding the Severance Package past objections, and that Ron Wilson was the only person to speak substantively in favor of the Severance Agreement and one of the few with any opportunity even to know what it contained. The testimony of Tom Bright made it even clearer that Ron Wilson was the primary architect of and driving force behind the Severance Package. Wilson and Thompson had a disproportionate influence on passage of the Severance Agreement, and they never should have been involved. *Buell v. City of Bremerton*, 80 Wash. 2d 518, 525,

495 P.2d 1358, 1362 (1972) (tainted voter “in his role as chairman... could not be expected to hear the weak voices as well as the strong and most certainly could not appear to the public to be able to do so”; accordingly the chairman’s self-interest “infected the action of the other members of the commission regardless of their disinterestedness”).

Courts have also applied the one-tainted-vote rule where the *matter was not announced in advance or extensively debated*, or the procedure surrounding enactment was otherwise suspect. See *Dowling Realty v. City of Shawnee*, 32 Kan. App. 2d 536, 539, 85 P.3d 716, 719 (2004) (court applying one-tainted-vote rule noted that tainted voter had “strategy to put [the interested vote] on the end of the meeting” to ensure that fellow members would “be tired and sail right through” and a fellow member noted that the proceedings were “not exactly kosher” and that “the process seemed hurried up.”). Trial established that the Severance Package could have been placed on an agenda for a December meeting (either standing or specially called), allowing public comment and careful consideration of the terms of the Severance Package. It is apparent this was not done in order to minimize the opportunity for any organized opposition. The videotape of the November 18 meeting and the other evidence about the negotiation of the Severance Package make it clear that the proponents of the Package were not interested in careful deliberation, nor in bargaining hard for the best deal the County could get. The deal was negotiated by a lawyer instructed to take whatever deal he could get, and it was not publicized for scrutiny in advance. These facts removed the process further from the realm where political response and redress were possible, making the one-tainted-vote rule applicable.

The one-tainted-vote rule has been applied where existing *conflicts of interest were kept hidden* by the interested party. The evidence showed that conflicts of interests and improprieties that attended the November 18 vote were not generally known. However, Preston – the most

interested party – was plainly aware of them. Michael Thompson was equally aware of his own attempts to gain County employment. And given the circumstances, it defies common sense to believe that Ron Wilson (whose credibility and general probity are obviously subject to serious question) was unaware that his daughter received a contract enhancement just 17 days before the vote. Their silence in the face of these clear improprieties further supports applying the one-tainted-vote rule.

Finally, the fact that the outcome was *not subject to the normal process of political redress* calls for application of the one-tainted-vote rule. The matter itself could have been placed on an agenda for a later meeting but was not. Bill McAbee testified that his motions to reconsider were undertaken to insulate the Package from any future reconsideration, and the Severance Agreement was executed immediately after the November 18 meeting. Unlike a law of general applicability that can be undone at the polls, this action was insulated from review, making the one-tainted-vote rule appropriate. *See Keene*, 693 A.2d at 415 (acts of general applicability not as likely to be subject to one-tainted-vote rule because their “widely felt impact” allows aggrieved persons to “find an appropriate remedy at the polls”).

Anderson County would emphasize the extraordinary nature of this case, with all of the foregoing factors present. The County is not asking the Court to enunciate a sweeping rule. Rather, on the very particular and troubling facts of this particular case, the one-tainted-vote rule is the correct rule. The key leaders of the debate were biased. The benefit ran to one individual. The matter was not announced in advance. The debate itself was truncated and calculated to prevent any subsequent political reaction. And what is being invalidated is not an ordinance or law of general applicability, enactments that could be entitled to greater deference than the motion to approve this Severance Package. On this unique set of facts, which call into

fundamental question the validity of the approval of the Severance Package, the one-tainted-vote rule is the correct rule.

The record also establishes that the motion to end debate on reconsideration of the Severance Package passed by only a 4-3 vote, with Michael Thompson, Ron Wilson, and Bill McAbee in that slim majority. The testimony and videotape make it clear that the votes for the Severance Package and its funding were part of an integrated whole, and this 4-3 vote was part of that series. For this simple reason as well, one bad vote is enough to invalidate the Severance Package.

Preston relies on a passage from *Baird v. Charleston County*, 333 S.C. 519, 535, 511 S.E.2d 69, 77-78 (1999) to argue for a “margin-of-victory” rule, but *Baird* is not dispositive here. First and foremost, the question of whether one tainted vote could support invalidation when the margin is larger was not even presented in *Baird*. *Baird* involved a completely different context. It was a challenge to an ordinance – true legislation – that was subjected to multiple readings; the conflict of interest in question was disclosed; the law at issue was one of general applicability. Nor is there an indication that the challenged voter in *Baird* had a leadership role or special impact on the debate. Moreover, *Baird* involved a one-vote margin of victory, and so the question of whether one bad vote could invalidate a larger margin could not have been presented. In short, the precise factors that mean that the Severance Package should be reviewed under the one-tainted-vote rule were absent from *Baird*. *Baird* neither addresses nor precludes the one-tainted-vote rule in a case like this one.

Preston has also argued that Tom Bright’s opinion that approval of the Severance Package was a “governmental” act under *Cowart* somehow undoes this analysis. This argument confuses two distinct lines of cases. The relevant distinction for application of the one-tainted-

vote rule is between full-blown “legislative” acts and actions, like this one, that do not result in laws of general application or otherwise fall short of the full dignity of legislation. *Cowart*, by contrast, draws a different distinction, and for a different purpose. It distinguishes “governmental” from “proprietary” acts, for the purpose of determining whether an action taken by one elected political body can bind a successor body.

B. Improper Votes Were Cast in Favor of Preston’s Severance Agreement

The County’s allegations regarding the votes cast for the Severance Package were proven, and in all material respects admitted. There simply is no doubt that the Severance Agreement was passed with votes that never should have been cast, including the votes of its key proponents.

Michael Thompson. Both Thompson and Preston admitted that Thompson was actively pursuing employment from Preston throughout the time that the Severance Package was being negotiated and debated. Indeed, ***on the day after the vote***, Thompson went to Michael Cunningham, who had just been hired as Preston’s replacement, and asked to be hired into a Buyer position with the County, a job worth between about \$24,000 and \$36,000 annually. After Mr. Cunningham told Thompson that it would be a conflict of interest to hire him, Thompson testified that he “went to Joey” to seek the same job, and Preston admits he did his best to comply, signing a “Personnel Action Form” to hire Thompson sometime between November 18 and November 30. Beyond this, Preston also paid for appraisal training for Thompson – including advancing expenses for future training Thompson could be expected to take ***after Preston was no longer in office***. On November 18, Thompson was part of the consistent majority that voted with Preston’s interests on each decision leading to approval of the Severance Package.

Faced with these undeniable facts, Preston offers a variety of justifications. None of these is sufficient to remove the ineradicable taint that proceeds from having the Chairman of County Council vote on a severance package for the county administrator who is actively considering the Chairman's job application.

First, Preston protests that Thompson was very qualified and would be a good catch for the County. Putting to one side the fact that there did not appear to be any competition for Thompson's services, the strength of Thompson's resume is simply irrelevant. The pertinent point – which is indisputable – is that Thompson was seeking a benefit from Preston at the moment that he was helping push the Severance Package through Council. There can be no stronger case of conflict of interest, or appearance of impropriety.

Preston also points out that Thompson had begun asking for a job in the early part of 2008 and claims he had already made the decision to hire Thompson long before the Severance Package came up for vote. Here again, this fact makes no difference. What matters is that Thompson was still looking to Preston for a job and Preston had to affirmatively act to hire Thompson at the time Thompson voted for the Severance Package.

Preston next argues that because Thompson was a member of County Council, his new job would be a "transfer" and not a "new hire." Even accepting Preston's premise, this makes no difference, as the core fact remains that Thompson was looking for a benefit from Preston at the time of the vote. Moreover, because Thompson was an "elected employee" whose term had a fixed end, he was not "transferring" in any meaningful sense in that, absent being hired by Preston, he would not continue to have a job as of January 2009. This reality also undermines Preston's suggestion that it was appropriate to pay for Thompson's training because the County sometimes pays for training for employees; Preston's advance to Thompson for training in 2009

Ron Wilson. One bad vote is enough here, and Michael Thompson's vote was inescapably bad. But Ron Wilson's votes for each motion leading to the Severance Package were equally improper, and Ron Wilson's critical role in negotiating the Severance Package reinforces the conclusion that the tainted votes here require rescission, whether or not the margin of passage is wiped out.

Here again, the facts are essentially conceded and do not require much elaboration. Ron Wilson was chair of the Personnel Committee to which Preston's demand was referred. Tom Bright testified and documentary evidence confirms that Wilson was the driving force behind the decision to take whatever deal Preston and his attorneys would offer. Indeed, Wilson's Personnel Committee pushed forward to a settlement despite Bright's advice that the sitting Council had no reason to act at all, and that Preston's claims did not have substantial merit. In the face of this, Wilson instructed Bright to strike a deal with Preston – leaving Bright with little negotiating leverage. With the exception of Larry Greer's testimony that he had and destroyed an advance "working copy" of the Severance Agreement, it appears Ron Wilson was the only Council member to have seen the Agreement before the time it was distributed toward the end of the November 18 meeting.

In the very midst of the Personnel Committee's work – on November 1, 2008 – Preston signed a new and very much upgraded contract with Palmetto Agricultural Consultants ("PAC"), a venture that was wholly owned by Ron Wilson's daughter, Allison Schaum, and that had no other clients besides Anderson County. The new contract – which came only a year after the initial consulting contract signed by Preston between PAC and Anderson County – gratuitously increased PAC's hourly rate from \$65 (itself more than four times the highest hourly rate Ms. Schaum had ever earned) to an increasing scale starting at \$75 and moving to \$95. It improved

PAC's existing month-to-month term to a three-year term, which was given teeth with a generous and one-sided buyout clause – a clause that required the County to pay PAC if the County terminated the deal but called for no payment by PAC to the County if PAC terminated. That clause – extraordinary for an independent contractor – had a maximum potential value of \$397,800, according to the unrebutted expert testimony of Dr. Charles Alford.

Again, the impropriety is too clear to require elaboration. Ron Wilson's daughter received a huge benefit as a direct gift from Joey Preston, at the precise time Ron Wilson was running the County's "negotiation" with Preston over his Severance Package. A short time later, Wilson spearheaded the vote on that same package, giving the only speech at the November 18 meeting that even attempted to justify the Package. Wilson never should have voted, or chaired the Personnel Committee's efforts regarding Preston.

Preston's justifications for the new PAC contract are as hollow as those for the Thompson courtship. One of his suggestions is that the "severance" provision of the new PAC contract was not all that lucrative because the County could "reduce PAC's hours to an hour per week" and thus avoid any need to terminate the deal. However, the contract Preston actually signed apparently foresaw such a maneuver, and ensured against it in extraordinary language making it clear that the contract was intended to benefit PAC and Schaum, not the County. The contract provided:

2.2 VITAL SERVICES. Anderson County recognizes that the services under this Agreement are vital to Palmetto Agricultural Consultants, LLC and ***must be continued without interruption.***

Plaintiff's Trial Exhibit 77 (emphasis added.) Preston contracted away the County's right to cut PAC's hours. He can be seen here, as in other cases, doing all that he could both to benefit his friends and to tie the hands of the incoming Council that he perceived was unfriendly to him.

Preston next argues that Schaum's interest is irrelevant to Ron Wilson because she is an adult. Section 2-37(g) of the Anderson County Code shows this is incorrect. That provision imputes to a Council member the interests of any member of his or her "immediate family (i.e. brother, sister, direct ancestor or *direct descendant*)."

 (Emphasis added.) Ron Wilson's daughter is his "direct descendant." Moreover, by including "ancestors" and siblings in the definition of immediate family, the Code plainly indicates that the imputation of interests is not limited to dependents or minors. Any ancestor of a Council member would certainly not be a minor, and most siblings would not be either.¹

The question of whether PAC had been doing a good job² is as irrelevant as Michael Thompson's qualifications for a County job, and for the same reasons. The critical point is that Ron Wilson's direct descendant was given a markedly superior contract, when no new contract was required, at the moment that Ron Wilson was playing the leading role in obtaining approval of Preston's \$1.1 million deal.

Preston will also presumably point to Allison Schaum's testimony that she did not tell her father about her new contract despite the fact that he was upset when he learned – well before the new contract was executed – about the first contract she obtained from Preston. While Ms. Schaum's testimony about this is implausible, the more important point is that it is Preston's knowledge, not Ron Wilson's, that is critical here. Preston, having signed the new PAC contract,

was plainly aware of it, and he knew Ron Wilson held the key to the Severance Package.

Preston could and should have spoken up regarding this conflict of interest. But he did not.

¹ The Anderson County Code is in this respect different from the State Ethics Act. The State Act, however, would still apply to the Michael Thompson situation, as his own interests – not those of a child – were at stake.

² On that point, the testimony of Ms. Schaum tends to suggest she had not fulfilled any of the goals of her first contract before she got her second, more favorable contract – no Anderson County Food Coop was established; the number of CSAs declined; she managed to help get only 2-3 restaurants and no other institutions to buy vegetables from local farmers; and other than a \$1,000 grant application she wrote, the only grants obtained by Anderson County schools in the first year were grant applications the schools wrote themselves.

Plainly, his goals were to provide a “parting gift” to one of his friends and supporters, and to leave behind a contract his perceived adversaries in the next Council could not undo. So Preston remained silent about that gift and allowed Ron Wilson to provide a benefit to Preston in the form of his generalship of the Severance Package and his several votes in its favor.

In addition, Preston admits that he invested around \$200,000 in Ron Wilson’s Atlantic Bullion Ponzi scheme in the first and second quarters of 2009 using money he received from the Severance Package that Wilson had voted to approve. Preston also admits he sent other investors to Wilson’s business and was compensated for such referrals. Such investments and referrals certainly inured to the benefit of Ron Wilson. Given the timing of his investments and the use of severance proceeds to make them, it certainly raises an eyebrow and an inference that Preston was close enough to Wilson and had communicated with him about such investments at or around the time of the Severance Package.

Either the Ron Wilson or the Michael Thompson vote, standing alone, would be enough to invalidate the actions of November 18. The two taken together put County Council’s actions on that night so far beyond the pale of acceptable governmental behavior as to remove any doubt that the Severance Package must be voided.

Bill McAbee. The evidence revealed that Bill McAbee’s vote was also improper. For the reasons already given, the County does not need to prove yet another vote was improper to nullify the vote, but the facts surrounding the McAbee vote reinforce the impropriety of the events leading up to approval of the Severance Package. McAbee served on the Personnel Committee, and in the November 18, 2008 meeting he voted consistently for the Severance Package and related motions. It was McAbee who carried out the parliamentary strategy of

moving to reconsider both the Severance Package itself and the related motion for funding, and who moved to cut off debate on the issue.

The evidence revealed that Bill McAbee had a business relationship with Amy Plummer that was sufficiently close to require him to recuse himself from matters affecting her interest. Between 2006 and 2008, McAbee and Plummer traveled often and lavishly together at County expense, including trips to Charleston, Chicago, Detroit, Washington, D.C., and New York. No other Council member traveled all over the country in this fashion – and certainly not with a business associate. While McAbee justified the travel as having been undertaken for County economic development, he could not identify any concrete benefit to the County.

Whatever doubt there might be about the impropriety of McAbee's travel, and Preston's approval of that travel, such doubt was removed by McAbee's two farewell trips. McAbee was defeated in the June 2008 primary and was effectively a lame duck thereafter. Despite this, he took two trips with Amy Plummer during October 2008 – the very time that the Personnel Committee on which he sat was considering Preston's demand for severance. The first trip was to New York City for the "RailTrends" conference (September 30-October 1) and the second was to Washington, D.C. for a gasification conference later in October. McAbee was reimbursed \$2,606.90 for the first, and \$2,812.82 for the second.

Given the forward-looking nature of economic development, there was no justification for the County to pay for these junkets. McAbee was leaving office and would not be in position to follow up. Preston's approval of the trips was a pure gift (of County assets) to McAbee and Plummer, given at the precise time that McAbee was serving on the Personnel Committee and preparing to vote on the Severance Package. This rendered McAbee's vote improper.

Preston testified that he did not have discretion to deny any expense reimbursement claimed by any Council member. Even if true, this obligation does not extend to Amy Plummer, and the benefit to Plummer is imputable to McAbee by virtue of their close business ties – in a business that could benefit directly from these trips. Moreover, Preston’s testimony is belied by the fact that he did, in fact, deny an expense reimbursement to Cindy Wilson. More generally, Preston plainly showed the ability to take a firm stance with Council members – at least those who were not in his good graces – even to the point of initiating litigation with them. While Preston may not have been inclined to challenge a request from a political ally who was preparing to vote on the Severance Package, the fact remains that Preston did sign off on McAbee and Plummer’s last two, wholly unjustified, trips, and this approval rendered the McAbee votes for the Severance Package and related matters improper.

Under the one-tainted-vote rule, of course, the propriety of McAbee’s vote is immaterial. However, if this Court were to apply a margin-of-victory rule, McAbee’s third tainted vote would be significant. The Severance Package was originally passed by a 5-2 margin, and Bob Waldrep’s abstention on the reconsideration vote was plainly intended to express opposition. In addition, the funding package necessary for the Severance Package, passed as part of the same series of votes, was also approved 5-2.

The final point to make with respect to invalid votes relates to Preston’s argument at trial that the votes of Cindy Wilson and Bob Waldrep should be invalidated because they were voting in favor of a release for themselves. This argument fails for several reasons. First and foremost, there is no challenge to those votes in the pleadings; the issue is not presented. Beyond this, the argument proves too much. Every member of Council was receiving the same release; while the situation might be different where an actual suit had been filed against a Council member, giving

him or her an objectively measurable stake in the vote, that is not this case. Indeed, Preston's suggestion would make it all too easy to conflict out an opponent in a situation like this one, merely by alluding to a possible claim. If Preston is correct, *no one* should have voted on the Severance Package (and it would fail for that reason). The Waldrep and Cindy Wilson votes are also in a different category because (under Preston's argument) they voted *against* their supposed interest. Finally, given the rapidity with which the Severance Agreement was distributed and passed, there was no opportunity to analyze such conflicts; Preston and his supporters were responsible for that pace, and he should not now be able to benefit from it by disqualifying those who were opposed to that pace.

III. The Severance Package Was a Product of Fraud and Abuse of Power, and Was Unreasonable and Capricious. It Also Violated Public Policy.

The seven-figure parting gift bestowed on Preston was objectively unjustifiable. It was premised on an anticipatory breach claim that could not exist, and it paid Preston far more than his contract was worth. Preston's attempt to justify the payment on the basis of the "toxic" political atmosphere in Anderson County does not withstand analysis. On top of this, Preston's silence while the matter was being debated – in the face of his own clear knowledge that several Council members had disqualifying conflicts – was fraudulent. The outgoing Council's casual "generosity" with public money was a fundamental violation of the public trust.

The courts have the authority to invalidate an enactment, even if there were no tainted votes, "in cases of fraud or clear abuse of power, or where [the action was] unreasonable or capricious." *Moody v. City of Orangeburg*, 319 S.C. 184, 186, 460 S.E.2d 374, 375 (1995) (quoting *SCE&G v. South Carolina Pub. Serv. Auth.*, 215 S.C. 193, 212, 54 S.E.2d 777, 785 (1949)). A court may also invalidate a county council action that violates the public policy of the state. *Piedmont Public Serv. Dist. v. Cowart*, 319 S.C. 124, 136, 459 S.E.2d 876, 882-83 (Ct.

App. 1995) (invalidating employment contract as *ultra vires* and contrary to public policy), *aff'd on other grounds* 324 S.C. 239, 478 S.E.2d 836 (1996); *Thompson v. Atlantic City*, 921 A.2d 427 (N.J. 2007) (invalidating settlement and release agreement with city procured for mayor of that city by political allies because conflicts of interest inherent in negotiation violated public policy); *see also Berkeley Elec. Coop. v. Town of Mt. Pleasant*, 308 S.C. 205, 417 S.E.2d 579 (1992) (invalidating franchise not created by ordinance); *Business Lic. Opposition Committee v. Sumter County*, 311 S.C. 24, 426 S.E.2d 745 (1992) (invalidating ordinance adopted in violation of Freedom of Information Act). *See generally Department of Transp. v. Brooks*, 328 S.E. 2d 705, 717 n.14 (Ga. 1985) (“Judicial review of the legislative acts of municipal governing authorities traditionally has been more intense than judicial review of the acts of the General Assembly. . . . Ordinances are examined for reasonableness; acts of the General Assembly are reviewed for constitutionality.” (Citations omitted)).

Anderson County’s second and seventh causes of action seek rescission of the Severance Package on grounds of violation of public policy and its unreasonable and capricious nature when viewed objectively. The third through sixth causes of action all rely on Preston’s failure to speak, in the face of a duty to speak, to inform Council that improper votes were being cast in his favor.

A. The Severance Package Was Unreasonable and Capricious on Its Face.

1. Preston Could Not Assert an Actionable Claim for Anticipatory Breach.

Trial only confirmed what was already clear in this case: Preston did not have a valid claim for “anticipatory breach.” The very Employment Agreement that he said was going to be breached provided that Preston “serves at the pleasure of Council,” and that the Council may “terminate the services of the Administrator at any time.” Though it might give rise to a claim

for severance, termination alone would not be a breach. Further, Tom Bright advised the Personnel Committee that there was also a substantial question, under the *Cowart* decision, as to whether the Employment Agreement was enforceable beyond the term of the existing County Council. As it turns out, Mr. Bright was correct about this.³

Moreover, Preston's entire claim was premised on a ***prediction*** of what the incoming County Council majority might do after it took office in 2009. The testimony was clear and uniform that the sitting Council had done nothing to impair Preston's contractual rights in any way. The "future majority" had no power to act – as Chairman Thompson remarked during the November 18 meeting, a letter signed by members-elect "has no value."⁴ And as Larry Greer aptly noted, until a vote is called and hands are raised, you can't know how members of Council will vote. A repudiation or "anticipatory breach" requires a statement or action ***by a party to the contract allegedly being repudiated***. The incoming majority did not embody Anderson County, and Anderson County itself had done nothing that could constitute a breach. *See* RESTATEMENT (2D) CONTRACTS § 250 ("a repudiation is a statement ***by the obligor to the obligee*** indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach" (emphasis added)); *see also Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 204 Fed. Appx. 208 (4th Cir. 2006) (anticipatory breach must be "unequivocal," "unconditional," and a "final and absolute declaration that the contract must be regarded as altogether off"; applying S.C. law).

Instead, the ***only*** thing that changed in the time leading up to Preston's demand letter was a ***political*** sea change. Preston perceived that the new majority was going to challenge his

³ The Michael Cunningham contract, virtually identical to the Employment Agreement in its terms concerning duration, was recently the subject of litigation that resulted in a ruling that such a contract is void. Plaintiff's Trial Exhibit 96.

⁴ Plaintiff's Trial Exhibit 5, at p. 30 (Bates No. Plf_02019).

stewardship of Anderson County government and finances. While this political change might, in fact, have introduced new challenges into Preston's job, the people had every right to go to the ballot box and cast their votes for their representatives. Preston's attitude at trial was that there was something illegitimate about the newcomers. But the fact is that they – and not Preston – were the people's elected representatives.

On the other hand, it was completely illegitimate for Preston and his allies to respond to the popular election by voting to give Preston a golden parachute to which he had no contractual or other legal right. It is plain that Preston was responding to a political setback, not a legal wrong. He began inquiring into his options for early retirement in July – long before the demand letter – and Tom Bright's notes reflect that Preston's lawyer, Rob Hoskins, said Preston wanted to go out "on his own terms."⁵ The Severance Package was an exit strategy, not a reaction to an actual breach. It was arrogant and wrong to use public money to pay Preston over a million dollars so that he would not have to deal with political inquiries that might be coming his way.

2. The Amount of the Severance Package Was Unjustifiably Large

Besides being based on a logically impossible claim, the Severance Package was also arbitrary and voidable because of its sheer size. Preston's own lawyer acknowledged in negotiations that the total severance benefit in the Employment Agreement was worth no more than \$827,222.00.⁶ The evidence presented by Dr. Alford demonstrated that even this number was inflated.⁷ But the primary point is that, in paying Preston over \$1.1 million, County Council went far beyond the maximum amount Preston could have obtained even if he received 100% of the severance provided in his Employment Agreement.

⁵ Plaintiff's Trial Exhibit 95.

⁶ Plaintiff's Trial Exhibit 22.

⁷ Defendant's Trial Exhibit 53.

The major component forming the difference between “full severance” and the amount Preston received was the payment of \$355,848.95 to the Retirement System to purchase over seven and a half years of extra service credit to qualify Preston for immediate, full retirement. And the actual benefit flowing to Preston was even greater – Dr. Alford testified that the present value of the incremental pension benefits purchased for Preston, at the time of that purchase, was approximately \$900,000. Plainly, Preston’s Employment Agreement did not promise him employment all the way to retirement, nor did its severance provision provide for a pension for life. This payment – a gift by the County of a life pension at age 45 – is emblematic of the utter disconnect between the Severance Package and reality. Preston had no claim for such a pension. Yet his friends on County Council did not even blink in spending County money to confer that benefit.

B. The Various Justifications Offered by Preston Do Not Rescue the Severance Package

Faced with the implausibility of his claim of anticipatory breach, and the unreasonableness of the amount he was paid, Preston seeks to justify the Severance Package on the basis of the “toxic political environment” in Anderson County. When one analyzes the elements that make up this purported toxicity, though, it is clear they will not support the Severance Package. Indeed, one of the most powerful pieces of evidence that this toxicity was not a breach is the simple fact that Michael Cunningham – whose service as Deputy County Administrator during Preston’s tenure armed him with more detailed knowledge of the political landscape than almost anyone else – readily accepted the County Administrator post when it was offered, and at a rate of pay substantially less than Preston had been receiving. Indeed, Preston himself had endured many years of the same purported “toxicity.” The fact that – for whatever

reason – he was now ready to move on does not convert the rough-and-tumble nature of Anderson County politics into a wrong entitling Preston to over a million dollars.

Meetings of Incoming Majority During 2008. The first evidence of toxicity Preston points to is the series of meetings involving Bob Waldrep, Cindy Wilson, the three newly elected members, and other interested citizens. There is simply nothing impermissible about these meetings, or the desire of new members to orient themselves before their first day in office. Indeed, Preston offered his own orientation meetings for new members; he plainly had no quarrel with the concept. These meetings do nothing to justify paying Preston \$1.1 million.

Presumably, Preston’s response is that these meetings included plans for possible future action that might involve him. Even assuming this to be the case, it does not justify paying him. When the meetings occurred, those present were not empowered to act for the County. Preston’s argument still reduces to a claim that he *expected* some actionable conduct by a new County Council in the future. It is as if he had written a demand letter claiming entitlement to a payment because “I expect to be hit by a County dump truck next year.” However earnest the belief, that speculative claim of what might happen in the future would not justify a payment.

The same analysis applies to Eddie Moore’s email reference to “running Preston off” and to joint letters issued by the future majority. None of these actions had any official status. Only when those individuals took office – and acted as a body on behalf of the County – could their actions be attributed to Anderson County, and only after that could they conceivably have any impact on Preston’s employment status.

It is important to emphasize the difference between rhetoric and action. Even reckless talk of what the future majority might do, once it was in power, is very different from actual action by the County. Rhetorical excess by political candidates is not a basis for payment of

severance by the County. As Eddie Moore testified in his deposition, once in office, he would not knowingly undertake an action that would violate a statute or contractual provision.

The August 5 Audit Workshop. Preston also focuses on a statement prepared by Councilman-elect Eddie Moore and presented by Bob Waldrep, calling for an audit of County finances coupled with a paid leave of absence for Preston and Gina Humphreys, the County's Finance Director. Putting to one side whether such leaves of absence would be an appropriate practice when conducting such an audit, this episode also offers no justification for paying Preston \$1.1 million. Here again, the proposal is just that – a proposal. (It is noteworthy that there is no evidence that Humphreys was ever placed on paid leave after the new County Council took over in January 2009.) The gathering was not a formal Council meeting, and the proposal was never acted on. Indeed, the proposal was expressly identified as the view of one or more persons who were not yet on Council. This meeting took place well before the general election, let alone installation of the new Council. It might never have been acted on. And if it were acted on, it could very well have been accomplished in a manner that did not breach any obligation of the County. Indeed, the sitting Council had itself approved a budget ordinance with a separate provision providing for a detailed forensic audit of the County's finances; that alone is enough to demonstrate that talk of a similar audit in the future was not a breach. To say Waldrep's speech at the workshop justified payment to Preston is groundless.

Anonymous Letters and Conduct. Preston's counsel tried to make something of anonymous and threatening letters and conduct addressed to Preston and certain members of County Council. This testimony was disturbing, but it provides no basis for a settlement by the County. The conduct was anonymous, which means it is not attributable to the County. Even if it were attributable to any County employee, a fact that Preston utterly failed to establish, such

conduct would plainly be outside the course and scope of employment, and thus not the County's responsibility.

Moreover, the conduct was not directed solely at Preston. The County did not offer settlement packages to Michael Thompson or Bill McAbee or Kelly Nichols or anyone else on the basis of the letters they said they received. However reprehensible this conduct may have been, it is misleading to assert that it obligated the County to pay Preston a severance.

Prior Skirmishes Between Preston and Those Who Questioned His Administration. In seeking to establish that he should be paid for "toxicity," Preston relies heavily on a 2008 lawsuit he filed against Cindy Wilson and Bob Waldrep, in which he sought injunctive relief to prevent them from allegedly interfering with his job. In support of his request for a temporary injunction in that case, Preston set forth a laundry list of conduct that he ascribed to them in an affidavit.⁸ Preston testified that this list of examples of interference was complete at the time the affidavit was prepared, that he would have included "everything he was aware of," and that all of the incidents of interference pre-dated September 25, 2008 – the date of his demand letter to the County in which he claimed anticipatory breach of the Employment Agreement.⁹ There are several independent reasons that this collection of grievances will not support the decision in late 2008 to pay Preston \$1.1 million. First, the list itself collects every significant grievance back to 2002; if those stale actions justified quitting – let alone a severance – Preston should have been gone long before. Second, many of the items on the list are either trivial, or reflect genuine political questions, or both. For example, Preston contended that Ms. Wilson's interference with his job included the following:

⁸ Plaintiff's Trial Exhibit 79.

⁹ Plaintiff's Trial Exhibit 3.

- a. December 3, 2002, Ms. Wilson infers [*sic*] the County was improperly paying travel costs for a particular employee and another Council member asks her to go to Mr. Preston to discuss her questions;
- b. On January 21, 2003, Ms. Wilson complains that she thinks a campaign manager for a County Council candidate was working for the County;
- c. On July 18, 2006, Mr. Preston tells Ms. Wilson if she has concerns about the Animal Shelter to please meet with him and the Director. Mr. Preston states, "I welcome you and I'll schedule a meeting."¹⁰

The mere fact Council members clashed with a county administrator does not entitle the administrator to a lifetime retirement benefit. Preston testified that none of the "interference" that he cited as examples in his lawsuit against Wilson and Waldrep was so bad that it caused him to quit his job. Indeed, in the September 25, 2008 demand letter written on Preston's behalf by his lawyer, it was expressly stated that, while "[c]ertain Council Members have hindered Mr. Preston's ability to perform his duties as County Administrator for at least seven years," Preston "has overcome the efforts [to] stymie him in the performance of his duties." The letter was express and clear in stating that the concern was with what was going to occur starting in January 2009. Thus, all of the prior conduct to which Preston now points could not offer a justification for paying him a severance; these were past matters – many quite stale – that Preston by his own admission had handled. His concern was solely for the political change that he expected to occur in the future.

Perhaps the most significant point regarding this argument, though, is that Preston sought and obtained a remedy in court for the very matters that he now tries to argue provided justification for paying him severance. Far from being driven from office by "interference" and "toxicity," at the time of the Severance Agreement Preston had taken legal action to address

¹⁰ Plaintiff's Trial Exhibit 79, p. Floyd_0060 (further citations omitted).

these very issues; the same events cannot be invoked a second time to justify his Severance Package.

The Plan to Give “An Order He Can’t Follow.” At best for Preston, this was a stray comment tossed off while heading to a party. But Tom Allen denies making the comment at all, and even if it was made it has no weight. Here again, this is at most a vague reference to something that might occur in the future. Moreover, the nature and content of this planned order is never specified. If a legitimate order were given and Preston disobeyed it, cause for termination might well exist. But the point here is that one can only speculate about this, because the supposed order was never formulated – let alone given.

Unspecified Torts. Preston also seizes on Rob Hoskins’ letters’ statements that Preston has other claims, including unspecified tort claims against individual Council members and/or incoming Council members, and seeks to justify his Severance Package in part based on the release of such claims. The only reference to tort claims in the Hoskins letters comes in his October 23, 2008 letter, when he says, “there also exist a number of causes of action which Mr. Preston will assert against two current Council Members as well as maybe one or more incoming Council Members. His additional causes of action will, obviously, include tort claims given the extreme malice and intentional nature of the actions of the subject Council Members over the past several years.”¹¹

No further articulation of any specific tort claims is contained in this or any other letter from Mr. Hoskins. Tom Bright testified that Mr. Hoskins never elaborated on what these tort claims might be. None of the otherwise unspecified tort claims were alleged to be against Anderson County as an entity, and the text of the letter indicates tort claims that would be stale

¹¹ As indicated earlier, this appears to refer to the several years of “interference” that Preston alleged against Council Members Cindy Wilson and Bob Waldrep – the same conduct that was already the subject of legal action by Preston against those two individuals.

(beyond the three-year statute of limitations, for one thing) and intentional torts that would give rise to claims against individuals and not the County. The very language of Mr. Hoskins' letter confirms there is no justification for paying Preston a severance based on unidentified tort claims that do not implicate the County. A straightforward way to see this is to imagine a demand letter sent to the County, with this simple language: "I have tort claims against two council members and several yet to take office. Please send money." Without a doubt, it would be unreasonable and arbitrary for the County Council to spend County funds to resolve such unspecified and ambiguous claims. Yet Preston's supposed tort claims are not backed by any greater specificity.

The Scope of the Release in the Severance Agreement. Preston also argues that payment to him in excess of the maximum amount he could claim under his Employment Agreement was acceptable because of the scope of the release in the Severance Agreement. However, these unbargained-for incidentals are merely standard release boilerplate. Their presence does not transform an arbitrary agreement into a reasonable one, or justify paying Preston six figures more than could possibly be justified under his Employment Agreement.

Preston first asserts that the scope of the release in the Severance Agreement appears to be broader than that strictly required under the Employment Agreement, in that it goes beyond releasing the County alone. However, the release language in the Severance Agreement is plainly standard release language; entity release language routinely includes individuals associated with the entity. This language is not some specifically bargained for benefit of any significant value, and it certainly does not offset the pension-for-life that was given to Preston, completely and indisputably in excess of any amount due him under the Employment Agreement. In contrast, the language in Preston's Employment Agreement to which Preston refers is not actual release language, but only a requirement that release language be drafted and

entered into if and when severance is paid. Comparing the two is comparing apples and oranges. As a practical matter, the scope of the release in the Severance Agreement is what would be the normal outcome of drafting a release pursuant to the language in the Employment Agreement.

Preston's argument that, in exchange for the Severance Agreement, he gave up his right to indemnification by the County as specified in the Employment Agreement, is similarly flawed. Like the release language discussed above, there is no evidence that this provision of the Employment Agreement was the subject of any negotiation; it is merely an incidental consequence of the general release language in the Severance Agreement.

More importantly, the indemnification language in Preston's Employment Agreement does not have any independent value in any event. First, the South Carolina Tort Claims Act gives Preston the same protection that this indemnification provision purports to give him. S.C. Code Ann. § 15-78-70 confers immunity on governmental employees like Preston if they are operating within the course and scope of employment. Since this immunity has the same scope as the indemnity Preston says he bargained away, he effectively gave up nothing to the extent that the release in the Severance Agreement released that indemnity.

Beyond this, a consistent line of Attorney General's opinions has maintained that a governmental entity like Anderson County is not permitted to indemnify an employee like Preston, regardless of contract language. *See* S.C. Attorney General Op. of September 29, 2004

(surveying opinions holding governmental entities may not enter into indemnity agreements).

Indeed, such a contractual grant of indemnity would be inconsistent with the South Carolina Tort Claims Act, which limits the waiver of sovereign immunity, since the indemnity would effectively constitute an additional waiver of immunity. For this reason as well, Preston did not give up anything to the extent he release the right to indemnity in his Employment Agreement.

The scope and structure of the release contained in the Severance Agreement do not provide a justification for the exorbitantly large payment given to Preston by that Agreement.

Desire for an “Amicable Divorce.” Another argument that Preston and those Council Members who voted in favor of the Severance Package make comes in the form of a suggestion that Anderson County had been struggling with political factions (those supportive of Preston and those unsatisfied with him) and that a justification for the Severance Package was to end such struggles. This was summed up in the testimony of Gracie Floyd, who testified that she was “sick and tired” of all the infighting in Anderson County and just “wanted to get Anderson County back in business.”

There are any number of problems with this argument. First, if this were sufficient justification for the payment of public money, then it opens the door to solving every political problem in the same way. An easy way to analyze this approach is with a hypothetical. Imagine the Council decided, instead of paying Preston the Severance Package, to pay a Council member who was perceived as particularly difficult to work with *not* to take office. Such a solution would have the same effect of minimizing the political struggle and allowing Anderson County to get back to business. After all, as Preston himself testified, Council members are employees of the County. Such an arrangement would obviously be wrong.

The analysis is no different just because Preston had an employment contract or sent a demand letter to the County making a logically impossible future claim. It is critical to remember how this matter came up in the first place. The political struggles in Anderson County existed, by Preston’s own admission, for several years. He complained of incidents of supposed interference with his job that went as far back as 2002. However, as long as Preston’s friends and supporters were in control of County Council, the political “toxicity” and the political

struggle never seemed a sufficient justification to pay Preston well over a million dollars to send him into early retirement. Preston coped with this toxicity perfectly well until the voters intervened.

Thus, the issue became one of concern only after a popular election – the Anderson County Republican primary in June 2008 – ratified those who wanted what Preston and his supporters did not – transparent government. Preston was being paid well – over \$160,000 a year in salary – to handle a political post. It is simply part and parcel of the job of a County Administrator to deal with the politics of running a governmental entity on a day-to-day basis. When difficult and politically charged issues came up, Preston had to deal with them as part of his job. The fact that his supporters lost an election can never be the justification for the payment of \$1.1 million in public money to a public servant.

If one considers an alternate scenario, in which Preston saw the change of political tide coming, announced he was considering his resignation, and then requested a buyout under the Employment Agreement, that might present a closer case. In such a case, if the parties negotiated openly and at arm's length to a severance that was less than the full amount due in the event of termination without cause, the question of reasonableness might be much closer. But this is not that case.

The County is not suggesting that a modest buyout of a County employee could never be an appropriate expenditure of public funds. It is not the County's burden to prove that any payment at all to a departing County employee would be unreasonable. The County simply has to show that this particular payment was unreasonable. And it plainly was. Here, the Court is not faced with a difficult scenario like that mentioned above. The County is not asking this Court to invalidate a "cost-of-defense" type nuisance settlement or an agreement to pay a County

employee a few months' severance. Instead, this case involves a buyout that did not result from any arm's length negotiation; such a negotiation would necessarily result in a buyout of some amount less than the maximum contractual severance. What happened here is undisputed -- Preston received a Severance Package that included payments *substantially in excess of the maximum amount Preston could ever recover as a severance payment* under the Employment Agreement.

Spending public money to help the outgoing county administrator retire at 45 is not a valid public purpose. Paying more than the maximum possible recovery for termination without cause is not a valid public purpose. It is illegitimate to say "we're just buying out his contract to avoid future trouble," and then pay mid-six-figures over the maximum contract amount.¹² That sort of conduct is arbitrary, and it is a pure waste of County resources. Shareholders in a private company would not stand for such a use of their money. Anderson County taxpayers need not stand for it. And this Court can and should remedy it.

In a separate argument, Preston and his attorneys like to suggest that the Severance Package is somehow justified because the County has spent a substantial amount of money investigating Preston and litigating various issues concerning the Severance Agreement. Such an argument is not pertinent here. If the Severance Package was improperly approved by the use of tainted votes and if it represents arbitrary and capricious government action, then the County cannot be criticized for mounting a legal challenge to it. Indeed, it is equally plausible to argue that the 2008 majority caused these expenditures by the way they handled the consideration and contents of the Severance Package.

Tom Bright's Worst-Case Scenario Valuation Does Not Justify the Severance Package.

Preston has suggested that testimony of some Council members that Tom Bright mentioned a \$2

¹² Defendant's Trial Exhibit 53.

million figure in connection with Preston's claim supports paying Preston \$1.1 million. It does not. Tom Bright's testimony was clear and credible that any number in this range that he might have mentioned was a "worst-case scenario," not a valuation or a recommended settlement value. He simply took Preston's demand as a starting point and added a large number for attorney's fees. Any lawyer, when asked about the worst thing that might happen, will provide a big number. However, it is not reasonable to use that nuclear scenario as a basis for settlement – especially when the only legal advice provided is that the claim itself does not have merit. And that is what Tom Bright told County Council and its Personnel Committee.

Moreover, it's clear from the testimony of Tom Bright and others that Ron Wilson and the Personnel Committee were not looking to Mr. Bright for advice on what to pay. Indeed, Bright's advice included the suggestion that the Council do nothing. But the goal of Ron Wilson and others was to get Joey Preston out the door before the newly elected Council came in, and they were willing to pay him whatever he asked to do that. This can be seen in the instructions to Bright, in the lack of hard bargaining, and in the way the November 18 meeting was run. The goal was not to minimize what the County paid Preston or to have a full public debate. The goal was to strike the deal quickly and irrevocably, with a minimum of prior notice or public input.

Bear Enterprises Does Not Shield the Severance Package from Scrutiny. Preston's counsel has periodically invoked *Bear Enterprises v. County of Greenville*, 319 S.C. 137, 459 S.E.2d 883 (Ct. App. 1996), and suggested that *Bear* somehow prevents review of the Severance Package for arbitrariness. To the contrary, *Bear* expressly recognizes the judicial power to review the actions of a county for arbitrariness. Nor is the *dictum* in footnote 1 of *Bear* relevant here. The Court of Appeals there stated its "feeling" that it was "inappropriate" to examine

County Council members regarding their individual motives for voting, but went on to observe that “the County did not object to the procedure in this case.”

First and most importantly, Anderson County does not agree that its case rests on the admissions of individual Council members regarding the thinking behind their votes for the Severance Package. To the contrary, Anderson County has been consistent in arguing (i) that the Thompson, Ron Wilson, and McAbee votes were objectively improper; and (ii) that the Severance Package itself was objectively unreasonable, because it was premised on a legal claim that could not exist, it paid Preston far more than he could have claimed under his Employment Agreement, and the objective circumstances of the negotiation and debate show that the Package was not negotiated at arm’s length or in an attempt to get the best deal for the County.

Instead, it is Preston who has tried to defend the Package by introducing the testimony of Council members who say they found the political environment “toxic.” Thus, to the extent footnote 1 of *Bear* has any bearing here, it operates to knock out Preston’s toxicity justification for the Package. The County is not relying on motive; we believe invalidity is clear on the face of the agreements at issue here and the videotape of County Council in action. Having said that, for the reasons already discussed we submit that the purported motive of avoiding a future political fight and future toxicity, is an admission of an improper motive, and certainly one that will not support a \$1.1 million payout that included retirement at age 45.

Finally, *Bear* ultimately does nothing about the depositions of individual Council members because they were not objected to; there was no objection in this case, either.

IV. Preston’s Conscious Decision Not to Disclose the Improper Votes Is Further Grounds for Rescission

The County’s third through sixth causes of action all arise out of the admitted fact that Preston knew the facts that made the votes on his Severance Package improper, yet sat silently

by and allowed persons who should not have voted to vote in favor of the Package. Preston, as the highest unelected official of the County, owed a duty to the County to speak in a circumstance like this. These causes of action sound respectively in breach of fiduciary duty, fraud, constructive fraud, and negligent misrepresentation. The common thread running through all of them is Preston's calculated silence while he watched his Severance Package being secured by votes that never should have been cast.

Courts have granted the remedy of rescission for each of these causes of action. *See Verenes v. Alvanos*, 387 S.C. 11, 17-18, 690 S.E.2d 771, 774 (2010) (allowing plaintiff to seek "the remedy of restitution" for defendant's "alleged breach of the fiduciary duty of care."); *Avianca, Inc. v. Corriea*, 1993 WL 797455 (D.D.C. May 13, 1993) ("there are many potential remedies for a breach of fiduciary duty, including restitution, rescission, disgorgement of profits, and constructive trusts"); *McDaniel v. Kendrick*, 386 S.C. 437, 444, 688 S.E.2d 852, 856 (Ct. App. 2009) ("A constructive trust *results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty* which gives rise to *an obligation in equity to make restitution.*" (emphasis added)); *O'Quinn v. Beach Associates*, 272 S.C. 95, 102-03, 249 S.E.2d 734, 737-38 (1978) (upholding grant of rescission for constructive fraud).

V. Preston's Breach of the Severance Agreement

The County's Eighth and Ninth Causes of Action address the fact that, within days of its execution, Preston breached both the Severance Agreement and his fiduciary duty to Anderson County when he backdated documents to place in the personnel file of a County employee, Heather Jones. Much like some of his other efforts, such as the execution of a contract with PAC that included a buyout provision making it impossible to terminate without substantial financial penalty, Preston clearly had a broad desire to exert control over, and to thwart, the newly elected majority of County Council.

In furtherance of this effort and after the Severance Agreement was entered, Preston advised Ms. Jones to present him with two different backdated documents – one providing Ms. Jones permission to take a County vehicle home and use it for personal matters; the other providing that Ms. Jones would be reimbursed for 100% of the costs associated with up to four college classes per year for her professional development. Ms. Jones provided both these documents to Preston on or after November 26, 2008, and both were backdated to reflect the date of October 16, 2006.¹³ Then, after executing both of the backdated documents, Preston transmitted them both to another County employee on December 1, 2008 for placement in Ms. Jones's personnel file.¹⁴

In addition to these backdated memoranda, on December 1, 2008 Preston also directed Ms. Jones to provide him with a backdated memo to authorize her travel to Germany in the Spring of 2009.¹⁵ According to the terms of the Severance Agreement, Preston expressly agreed that he would stop serving as County Administrator at the end of business on November 30, 2008.¹⁶ Thus, Preston's conduct in presenting the backdated memoranda to a County employee for action on December 1, 2008 occurred after Preston was no longer the administrator. Preston admits that Michael Cunningham, who was hired to replace him as County Administrator, was the person who should have signed off on any requests made on or after December 1, 2008. Ms. Jones admitted that these efforts to backdate documents for her file were done to protect her from the incoming County Council – *i.e.* the elected majority.

These are falsified County documents. While Preston attempts to belittle the impact of his conduct, there is no question his actions were improper. There was an honest way to do this,

¹³ Plaintiff's Trial Exhibits 47 through 50; 52 through 54.

¹⁴ Plaintiff's Trial Exhibit 51.

¹⁵ Plaintiff's Trial Exhibit 56.

¹⁶ Plaintiff's Trial Exhibit 7, ¶ 2.

but that way was not discussed or considered. Instead, Preston breached his contract and his fiduciary duty to the County by creating falsified official documents during the period immediately after the Severance Agreement was entered. This was part of Preston's last ditch effort to exert dead-hand control over the County. While Preston claims this was nothing more than a memorialization of the prior agreements with Ms. Jones that did not cost the County money, the very point of the exercise was to commit the County to pay Ms. Jones for future classes, future trips, and allow the future use of a County vehicle for her personal use.

The whole point of the Severance Agreement was to have Preston terminate his service as County Administrator after a very brief, "stub" period. By falsifying documents and then attempting to act as administrator even after the stub period, Preston substantially and materially breached the agreement and his fiduciary obligations to the County.

VI. The Role of the Retirement System in Fashioning a Remedy

The County included the South Carolina Retirement System ("SCRS") as a defendant in this lawsuit because it is a party with an interest in the outcome, and the remedy sought by Anderson County will require the return of funds paid to SCRS on Preston's behalf or the redirection of funds currently being paid to Preston by SCRS. As it stands, Preston is currently receiving more than \$7,600 per month in retirement benefits paid by SCRS – retirement benefits to which Preston would not be entitled but for the County's purchase of retirement service credit on his behalf.

SCRS filed a motion for summary judgment in this case. Its contention is that it should be relieved of any further involvement in this case once it pays out benefits to Preston in an amount equal to the amount paid on his behalf, pursuant to the Severance Agreement, to purchase retirement service credits on his behalf. However, this analysis misses the point.

The County is not seeking any relief in this case that would put SCRS in a worse position than it is currently in. None of the requested relief by Anderson County will change any amounts that SCRS is otherwise obligated to pay. Instead, the unrebutted testimony (of SCRS itself) makes it clear that the retirement benefits currently paid to Preston through the day he turns 60 are all amounts to which Preston would not have been entitled but for the Severance Agreement.¹⁷ In addition, because of the purchase of retirement service credit on his behalf, Preston will receive benefit amounts after the age of 60 that will exceed what he would have received without such a purchase.¹⁸ Thus, the Court has a readily available source of revenue from which to fashion an equitable remedy that does justice under the facts and circumstances of this case.

The Retirement System cited S.C. Code Ann. § 9-1-1680 for the proposition that pension proceeds may not be redirected as part of the remedy in this case. This is incorrect, both on the face of the statute and as a broader proposition, given that any remedy in this case would be premised on a finding that the purchase of retirement service credits for Mr. Preston in 2008 was wrongful and should be rescinded.

First, § 9-1-1680 contains an express exception for precisely this type of case. It provides in relevant part, “[*S*]ubject to the doctrine of constructive trust *ex maleficio* . . . , the right of a person to an annuity or a retirement allowance . . . are exempted from . . . levy and sale, garnishment, attachment, or any other process” (Emphasis added.) Thus, the statute itself allows a constructive trust on retirement fund proceeds in the face of wrongdoing. This only makes sense, as it would be remarkable if a court of equity were powerless to undo an inappropriate purchase of service credit like the one at issue here. *See Matter of Loomer*, 198

¹⁷ Stipulation as to Evidence Related to Defendant SCRS, Exs. 1 & 2.

¹⁸ *Id.*

B.R. 755, 762 (Bankr. D. Neb. 1996) (“void [ERISA] contributions are not protected by the alienation restraint and may be disgorged from the Plan”; “funds in the account may be recovered under the federal common law theory that fraud in the inducement allows rescission of the contract.”).

In its Tenth Cause of Action, consistent with the statutory language, the County seeks the imposition of a constructive trust with respect to the SCRS assets. The purpose of this constructive trust is to ensure the Court can fashion a remedy that does justice. Preston was complicit in securing retirement benefits to which he was not entitled, benefits secured by tainted votes cast by interested parties who had a duty to recuse themselves. He was involved in the entire negotiation process and the meeting at which the Severance Package was approved, and never said a word about the impropriety involved in having Thompson, Wilson, and McAbee voting to use public funds to pay more than \$350,000 to secure an immediate and substantial retirement income for him. Preston is currently 49 years of age and will turn 60 on April 29, 2023. Between now and the day he turns 60, Preston will receive payments of more than \$950,000 from SCRS, not counting any cost of living adjustments during that time. None of these funds are funds to which Preston is entitled, given the circumstances under which they were obtained. The statute and equitable principles (set forth more completely in the section below dealing with rescission) allow the Court to fashion a remedy that includes the redirection of some or all of these funds to the County.

VII. The Severance Package Unjustly Enriched Preston

In its Eleventh Cause of Action, the County includes a claim for unjust enrichment. All of the elements of this claim are present in this case and were proven at trial. To prevail on a quantum meruit or unjust enrichment claim, a plaintiff must establish (1) he conferred a benefit upon the defendant; (2) the defendant realized that benefit; and (3) retention of the benefit by the

defendant under the circumstances make it inequitable for the defendant to retain it without paying its value. *Swanson v. Stratos*, 350 S.C. 116, 121, 564 S.E.2d 117, 119 (Ct.App.2002); *see also Earthscapes Unlimited, Inc. v. Ulbrich*, 390 S.C. 609, 616–17, 703 S.E.2d 221, 225 (2010) (providing the same requirements).

In this case, there is no adequate remedy at law because the Severance Agreement is void, both because it is arbitrary and capricious in the amounts given and the circumstances under which it was entered, and because it was secured with tainted votes. In order to fashion an appropriate equitable remedy under these circumstances, it is appropriate for the Court to look to the retirement payments currently direct to Preston – the very benefit he is receiving due to the inequitable circumstances he orchestrated. The value of that stream of payments is in excess of the amounts paid to and on behalf of Preston by the County under the Severance Package.

VIII. Rescission Is the Appropriate Remedy Here

Preston argues that rescission is unavailable because he does not have the ability to repay everything he received, and because he cannot be returned to the position of county administrator of Anderson County. This argument fails for several reasons: first, the “changed circumstances” rule he invokes is not available where the one invoking the rule is at fault; second, equity is simply not as limited in fashioning remedies as Preston suggests; and third, Preston ignores the public aspects of this case, and the fact that rescission is the remedy that must be invoked when a governmental action like this one is determined to be improper; the considerations here are different from those that might apply in a purely private contractual setting.

It is long established that a defendant may not assert a change of circumstances defense to rescission where the defendant is at fault for inducing the initial wrongful payment. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 65 (2011) (“The defense [of change of position] is therefore unavailable to a conscious wrongdoer or to a recipient who is

primarily responsible for his own unjust enrichment.”); *Admiral Ins. Co. v. American Nat. Sav. Bank, F.S.B.*, 918 F. Supp. 150, 156 (D. Md. 1996) (the change of circumstances defense is only available “if the recipient was no more at fault for its receipt of the payment than was the payor”); *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64, 72, 747 N.Y.S.2d 441 (2002) (change of circumstances defense “will not be strictly enforced where the party against whom rescission is sought is a wrongdoer who is exploiting its change of position to shield its wrongdoing”). That is precisely the case here. It is Preston who provided benefits to those voting on his Severance Package, and Preston who sought far more than even his generous Employment Agreement provided. He cannot invoke changed circumstances.

In particular, we believe Preston misreads *King v. Oxford*, 318 S.E.2d 125 (S.C. Ct. App. 1984). Reading the entire opinion reveals that the *King* court drew a distinction between rescission because of innocent mistake, and “fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to the rescission.” 318 S.E.2d at 128. The court then repeats that list in holding that the party seeking rescission did not establish “fraud, misrepresentation, concealment, or imposition” before using the word “fraud” alone as shorthand (rather than repeating the list yet again) in holding that the absence of such wrongdoing does require return to the status quo. Mr. Preston’s argument that this requires establishment of all the technical elements of fraud is incorrect. As makes sense with respect to an equitable remedy, the holding of *King* is that if the party opposing rescission is not innocent – *i.e.*, what is at issue is not mere mistake – that party cannot prevent fashioning of an equitable remedy by complaining about a change in circumstances brought about by the contract obtained by that party’s conduct.

Even under the “technical fraud” standard advocated by Mr. Preston – and still more under the proper equitable standard – Mr. Preston’s own culpability prevents him from relying

on the fact the County did not hold his post open since 2009 to avoid any remedy. *See* 17B C.J.S. Contracts § 652 (“Complete restoration is not necessary if the party that is not fully restored was actually at fault”).

It also cannot be ignored here that Preston is, in fact, not without assets. He is receiving a monthly pension that is the direct result of the excessive payments that he received that are over and above anything provided for in his Employment Agreement. Dr. Alford testified that the aggregate value of that stream of payments was, in fact, very close to the amount of Preston’s Severance Package. For this reason as well, there is no barrier to an appropriate remedy here.

The analysis does not change when the focus shifts from restoration to Preston’s old position, rather than the fact that some of the money he received has been taken away by taxes or other expenses. For the same reasons just stated, Preston does not have the benefit of the changed circumstances rule. Beyond that, courts have recognized that equity is flexible enough to allow rescission in a situation like this, even where a former position has been filled. *See Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 452 (4th Cir. 2004) (Traxler, J.; Wilkins, C.J. concurring in relevant part) (“in the event restoration to the status quo is impossible, rescission may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief”; court also recited unappealed ruling by district court that reinstatement would not be ordered because prior position was already filled); *East Derry Fire District v. Nadeau*, 924 A.2d 390 (N.H. 2007) (where severance agreement was obtained by misrepresentation (and at a meeting with one commissioner absent), rescission appropriate even though fire chief argued he was not returned to status quo because he lost benefits when out of office). *See generally* See 17B C.J.S. Contracts § 652 (“The parties, upon rescission of a contract, generally must be placed only in

substantially the same condition or position as they were when the contract was executed, or as near to it as possible. The exact, absolute, or literal return of the parties to the status quo is not required, and such restoration as is practicable and demanded by the equities of the case is sufficient. The status quo rule requires practicality in adjusting the rights of the party.'"). Simply, equity is not as strait-jacketed as Preston suggests.

Beyond these points, Preston's argument ignores a key aspect of this case. What is sought here is not merely rescission of a private contract. Instead, this lawsuit invokes cases that recognize that rescission is required when a public act has been taken improperly. When, as here, a governmental body acts on the basis of tainted votes, and in an arbitrary and unreasonable manner, it is imperative that an appropriate remedy be fashioned. The public interest in avoiding such improper acts must be given substantial weight in such a circumstance. In this regard as in many others in this case, the decision in *Thompson v. Atlantic City*, 921 A.2d 427 (N.J. 2007), is noteworthy. The beneficiary of the tainted settlement in that case argued, as does Preston, that the fact that much of the settlement had gone to taxes and payment of expenses meant that rescission was unavailable. The *Thompson* court gave this argument short shrift:

We are not persuaded by Langford's or Marsh's argument that equity demands that they should keep their settlement monies because they have already spent them on, among other things, attorney fees and taxes. A basic equitable maxim is that 'he who seeks equity must do equity.' . . . [W]e conclude that the only appropriate remedy to vindicate the public trust is the immediate restoration of the funds to the City.

921 A.2d at 442. Given this Court's power to balance equities and fashion an appropriate remedy, and the important public concerns at issue here, we submit that a rigid and mechanical insistence on return to the exact, literal status quo should not stand in the way of a remedy.

IX. Standards of Proof.

As has been noted by all involved, this case is atypical. The relevant facts are, in almost all instances, not in dispute by the parties. Instead, the focus is on the legal conclusions to be drawn from those facts. Given the lack of substantial dispute over the key facts here, the standard of proof becomes less important to the analysis: For example, under any standard, the County proved that Michael Thompson was actively seeking County employment, through Preston, at the very time that he voted on the Severance Package. The same is true with regard to Preston's knowledge of the new, favorable PAC contract executed on November 1, 2008 and the McAbee lame duck travel reimbursements that happened in the fall of 2008, while Preston's "anticipatory breach" claim was under consideration by the County. Nor is there any question of the role these three Council members played in passing the Severance Package. Similarly the amount of the Severance Package and the fact that it was premised on a claim of "anticipatory breach" by persons not yet in office are not subject to dispute.

Because all pertinent facts are clearly proven, the County submits that the applicable standard of proof is of less importance in this unusual case than it would be in other cases where the facts are in greater dispute. On the issue of standard or proof, counsel for Preston has contended that the correct standard for all of the County's causes of action is the clear and convincing standard. While the County concedes that this is the appropriate standard for certain of its claims, the record should be clarified on this point. While the County has not located any authority that sets forth the appropriate standard of proof for its First Cause of Action, it does concede that its Second, Fourth, Fifth, Seventh and Tenth Causes of Action¹⁹ require proof by

¹⁹ Second Cause of Action (Severance Agreement Void as Against Public Policy); Fourth Cause of Action (Fraud); Fifth Cause of Action (Constructive Fraud); Seventh Cause of Action (Arbitrary and Capricious Government Action); Tenth Cause of Action (Constructive Trust).

clear and convincing evidence. However, the County's remaining causes of action fall under the normal preponderance of the evidence standard.²⁰

X. Anderson County Is Entitled to Judgment on Preston's Breach of Contract Counterclaim.

The first and most obvious point to make about Preston's claim that this lawsuit itself violated the Severance Agreement is that if the Court invalidates the Severance Agreement, Preston cannot prevail on a claim for breach of that agreement.

Beyond this, the covenant not to sue plainly was not intended to be some sort of "incontestability clause," and absent very clear intent in the language to create that kind of a barrier, one should not be inferred. Tom Bright, who drafted the language, testified that there was no discussion or contemplation of creating such an incontestability clause. Accordingly, one is left to the terms of the Severance Agreement itself, and that language certainly does not reflect the kind of precise intent to prevent challenges to the validity of the document itself that ought to be present before such intent would be inferred. Courts have declined to treat covenants not to sue as preventing a challenge to the validity of the document itself. *Winchester Drive-In Theatre, Inc. v. Warner Bros. Pictures Distrib. Corp.*, 358 F.2d 432, 436 (9th Cir. 1966) ("[W]hen the very existence of a covenant is disputed in good faith that dispute must be resolved before the covenant can be recognized and allowance must be made for such resolution. . . . It

²⁰ Third and Ninth Causes of Action (Breach of Fiduciary Duty) (*Moore v. Benson*, 390 S.C. 153, 163, 700 S.E.2d 273, 278 (Ct. App. 2010) (where "the main purpose of the breach of fiduciary duty action in [the case at bar] was for the equitable remedy to rescind the contract" the appellate court was entitled to "find facts in accordance with our own view of the preponderance of the evidence.") (internal citations omitted)); Sixth Cause of Action (Negligent Misrepresentation) (*Turner v. Milliman*, 392 S.C. 116, 123, 708 S.E.2d 766, 769 (2011) ("To establish liability for negligent misrepresentation, the plaintiff must show [the elements of negligent misrepresentation] by a preponderance of the evidence".) (citing *McLaughlin v. Williams*, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct. App. 2008)); Eighth Cause of Action (Breach of Contract) (*Thomas v. Jim Walter Homes, Inc.*, 282 S.C. 267, 270, 317 S.E.2d 768, 770 (Ct. App. 1984) (concurring judge stated that "in order to establish a right of recovery for breach of contract, a plaintiff must prove by competent evidence the contract, the breach of the contract, and the damages proximately caused by the breach." (citing *Baughman v. Southern Railway Company*, 127 S.C. 493, 121 S.E. 356 (1924)); Eleventh Cause of Action (Unjust Enrichment) (*Columbia Wholesale Co., Inc. v. Scudder May N.V.*, 312 S.C. 259, 263, 440 S.E.2d 129, 132 (1994) ("We find the preponderance of the evidence indicates no unjust enrichment in this case and conclude quantum meruit recovery [in the principal trial] was improperly allowed."))

cannot rationally be argued that the covenant, retroactively, denied the right to the very litigation which was necessary to establish its existence.”); *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1016 (D.C. Cir. 1985) (covenant not to sue “would go only to the merits of the controversy settled – not to the existence or terms of the Settlement Agreement itself”). Given the important public policy issues at stake here, a provision that would prevent the County from seeking a determination of whether approval of the Severance Package violated its conflict of interest rules or public policy generally would itself be a violation of public policy.

More generally, the covenant by its own terms is limited to claims “relating to Mr. Preston’s employment with the County or his actions as an employee on behalf of the County.”²¹ This lawsuit is not about his “employment” or his actions taken “on behalf of the County,” but instead about the terms of his Severance Package and the manner in which it was adopted. To the extent the suit involves Preston’s actions, it involves the actions he took as the County’s *adversary* after he asserted a claim against the County, not his actions taken “on behalf of the County.” This lawsuit is about whether the Severance Agreement as approved by Preston’s allies was arbitrary, in violation of public policy, and/or supported by tainted votes. These claims are outside the scope of the covenant.

XI. Conclusion

In 2008, the voters of Anderson County sent a clear message that they wanted closer scrutiny of County government, including closer scrutiny of the long-time county administrator, Joey Preston. It was not unreasonable for Preston, faced with the loss of a pliable majority, to conclude life would be simpler if he left office. It was, however, most unreasonable and improper for Preston to line his pockets on the way out the door. The “anticipatory breach” claim was a sheer and indefensible pretext for a raw money grab. Preston’s friends on Council

²¹ Plaintiff’s Trial Exhibit 7, ¶ 8.

had financial ties to Preston that made it utterly improper for them to vote for the Severance Package, and the Package itself paid Preston far more than his claim was worth – including allowing him to retire with a full public pension at the age of 45.

The facts here are plain. They demonstrate that the Severance Package is an indefensible use of public money that should be rescinded.

Respectfully submitted,



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November 16, 2012

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Anderson County,

Plaintiff,

vs.

Joey Preston and the South Carolina
Retirement System,

Defendants.

IN THE COURT OF COMMON PLEAS

C.A. No. 09-CP-04-4482

AFFIDAVIT OF SERVICE

APPEARED BEFORE ME, the undersigned, an employee of the firm of WYCHE, P.A., who first being duly sworn, states that she has this 16th day of November, 2012, caused copies of the foregoing **Plaintiff's Post-Trial Memorandum** to be served on counsel for the parties by U.S. Mail, postage prepaid, addressed as follows:

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Victoria A. Wood

Victoria A. Wood

SWORN to before me this
16th day of November, 2012.

Brenda J. Miller

Notary Public for South Carolina

My Commission Expires: *March 31, 2021*

